Indiana Department of Education

Room 229, State House - Indianapolis, IN 46204-2798
Telephone: 317/232-6676

QUARTERLY REPORT

April - June 1995

The **Quarterly Report** provides information to the Indiana State Board of Education on recent judicial and administrative decisions affecting publicly funded education. Should anyone wish to have a copy of any decision noted herein, please call Kevin C. McDowell, General Counsel, at (317) 232-6676.

In this Report:

Desegregation and Unitary Status 2

Bus Drivers and Reasonable Accommodation 4

Title I and Parochial Schools 6

Drug Testing 7

Child Abuse 9

Court Jesters: Tripping the Light Fandango 9

Quotable... 11

Desegregation and Unitary Status

HEA 1646-1995 (P.L. 340-1995) at Sec. 110 addresses the continuing desegregation orders affecting the Indianapolis Public Schools (IPS), six township schools, and the State of Indiana. The General Assembly's language calls for a five-year schedule to return students to IPS, subject to approval of the plan by the federal district court. There is limiting language indicating that only money appropriated for court-ordered desegregation costs could be used to implement an approved plan, and such funds could never revert to the school's general fund. These provisions are related to one of several issues currently pending in the IPS desegregation suit (U.S. et al. v. Board of School Commissions of the City of Indianapolis et al., Cause No. IP 68-C-225). SEA 278-1995 (P.L. 201-1995) amended I.C. 20-8.1-6.5-2.5 (Court-Ordered Transfers) to permit the governing bodies of transferee school corporations to expand their governing body membership to include residents of the contributing geographic areas.

In the past year, three major issues have been raised in the IPS desegregation matter: transfer of kindergarten students, expanded voting rights of residents in transfer areas, and payment of desegregation costs by the State to IPS.

The MSDs of Lawrence, Wayne and Warren Townships (collectively, "LWW") petitioned the court to permit parents of kindergarten-aged students in their respective IPS transfer areas to place their children in their assigned township school or remain in IPS for kindergarten. MSD of Decatur Township later joined LWW in the Motion. The court's current transfer order addresses only students in grades 1-12. The township schools argued successfully that IPS students entering the township schools in the first grade were at a disadvantage and lacked readiness skills due to the disparities between IPS and township programs. The court noted that the Indiana State Board of Education's recent regulatory changes at 511 IAC 6.1-5-0.5 and 6.1-5-1 reflect the evolution of kindergarten from "fun and games" to a structured curriculum which provides a planned sequence of learning experiences.

LWW also successfully sought and achieved modification of previous court orders so as to permit all residents in the IPS transfer areas for LWW to vote in LWW school board elections and serve on LWW boards of education. The court's previous orders permitted only the parents of transfer students to vote and serve on school boards, but only if their children were still attending their respective township school. Decatur did not join in this Motion. The MSDs of Perry and Franklin Townships did not join either Motion and are unaffected by the court's orders of March 29, 1995.

The State of Indiana opposed the Motions because only some of the township schools were involved, which would result in disparate educational opportunities and franchise rights among IPS transfer areas; because the sought-for modifications tend to perpetuate the status quo rather than move towards achievement of desegregation and elimination of court oversight; and because the modification of the court order would require the State to provide additional funding without any harm demonstrated by the State.

The original LWW Motion actually sought a "partial unitary status," although this was later dropped. Central to LWW's Motion and the State's opposition on this issue was the U.S. Supreme Court's decision in Freeman v. Pitts, 112 S. Ct. 1430 (1992), which held that a federal district court had the authority to relinquish supervision and control over a school district in incremental stages before full compliance has been achieved in every area covered by the court's desegregation order. The court observed that "unitary" is an elusive term (at 1443-44), but reaffirmed its previous holdings that "federal judicial supervision of local school systems was intended as a 'temporary measure.' [citation omitted]. Although this temporary measure has lasted decades, the ultimate objective has not changed--to return school districts to the control of local authorities." Id., at 1445. The district court should have a plan as well as "an orderly means for withdrawing from control when it is shown that the school district has attained the requisite degree of compliance. A transition phase in which control is relinquished in a gradual way is an appropriate means to this end." The court added that "federal courts have the authority to relinquish supervision and control of school districts in incremental stages, before full compliance has been achieved in every area of school operations." Whether or not Freeman would permit "partial unitary status" was not addressed by the court in the IPS matter.

The concept of "unitary status" was first articulated in Green v. New Kent County School Bd., 391 U.S. 430, 88 S. Ct. 1689 (1968). Even though the Supreme court stated it is the duty of a school board to take necessary steps to convert to a unitary system in which racial discrimination would be eliminated "root and branch," the court also realized that success of these efforts is not a prerequisite to unitariness. Stell v. City of Savannah Bd. Of Pub. Ed., 860 F.Supp. 1563, 1568 (S.D. Ga. 1994). The question for a court becomes one of what is "practicable" in eliminating the vestiges of segregation: (1) Has there been full and satisfactory compliance with the court's decree? (2) Is retention of judicial control necessary or practicable to achieve compliance with the decree? (3) Has the school district demonstrated its good faith commitment to the whole of the court's decree (consideration of the school system's record of compliance)? Freeman, *supra*, 112 S. Ct. at 1446; Stell, *supra*, at 1577.

The court has not ruled on the Motion of IPS for the State to pay to IPS desegregation and transportation costs resulting from the loss of kindergarten-aged students to the four participating township schools. IPS, it argues, will have to close programs and transport students who remain, adding costs and services it does not presently offer. IPS also asks for the State to pay it for upgrading its kindergarten curriculum offerings so that students who opt to remain in IPS for kindergarten won't be at an academic disadvantage when they are required to attend their respective township schools. IPS made a similar motion in 1989 but without success.

The State objected because IPS is a "culpable defendant" in this dispute, and is not in the same situation as the township schools, who were not culpable defendants and whose desegregation and transportation costs are rationally related to the overall interdistrict remedy fashioned by the court. The State also objected to the IPS Motion because it is not related to eradication of racial discrimination or achievement of unitary status.

The district court's decision may be affected by the U.S. Supreme Court's decision of June 12, 1995, in Missouri v. Jenkins, 1995 WL 347368 (U.S.). In that 18-year-old desegregation matter,

the State challenged the district court's order that it fund salary increases for nearly all staff for the Kansas City School District and that it continue to fund remedial "quality education" courses. The desegregation plan is the most expensive in the country, far outstripping the school district's ability to budget or tax. The district court has required the State to bear the costs. The Supreme Court reversed, finding that the district court's order was not related to Freeman requirements and "is so far removed from the task of eliminating the racial identifiability of the schools within the KCMSD that we believe it is beyond the admittedly broad discretion of the District Court" in fashioning remedial action (pp. 16-17).

The Supreme Court also reversed the requirement that the State fund indefinitely the "quality education" courses until national norms are met. The district court should limit or dispense with its reliance upon improved achievement on test scores as an indicator of progress towards elimination of segregation or as an indicator of culpability. External factors not the result of segregation may be affecting the test scores. The "remedial quality education program should be tailored to remedy the injuries suffered by the victims of prior *de jure* segregation" (at 18). The Supreme Court added that "the District Court must bear in mind that its end purpose is not only 'to remedy the violation' to the extent practicable, but also 'to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution,'" citing to Freeman. (Ironically, the court in Freeman relied in part upon "objective evidence of black achievement" on standardized, nationally normed assessments of academic ability in upholding the district court's determination of unitary status. See Freeman, *supra*, at 1441-42.)

Bus Drivers and Reasonable Accommodation

I.C. 20-9.1-3 addresses certain requirements for school bus drivers for accredited schools in Indiana. I.C. 20-9.1-3-1(g) requires all school bus drivers to possess certain physical characteristics, including "possession and full normal use of both hands, both arms, both feet, both legs, both eyes and both ears." Although the statute details certain duties of several state entities or agencies, these duties generally involve safety training and bus inspection, but do not address which entity or agency determines whether a bus driver has the necessary physical capabilities. The law was passed in 1973, prior to the effective date for Sec. 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 (ADA).

Neither the Department of Motor Vehicles, the State School Bus Committee (I.C. 20-9.1-4, 575 IAC), the State Superintendent of Public Instruction, the State Board of Education nor the Indiana State Police are involved in determining the physical capabilities of a bus driver. Nonetheless, a complaint under the ADA was filed against the Indiana Department of Education by a bus driver whose left leg had been amputated below the knee. Her commercial driver's license (CDL) had an intrastate restriction due to diabetes mellitus, which is controlled by insulin. She was fitted with a temporary prothesis shortly after the amputation in January, 1995, with a permanent prothesis scheduled for July, 1995. Nonetheless, she was notified by the school that she could no longer operate a school bus due to State law.

Dana L. Long, Legal Counsel, investigated the complaint. She noted that no State agency has authority to waive I.C. 20-9.1-3-1(g) and that IDOE has no jurisdiction over private or public schools under the ADA. "The IDOE has no authority to make any employment decisions concerning school bus drivers in the State of Indiana. Such employment decisions are a matter of local control and authority, subject to the requirements of law." Whether or not a person has the "functional" use of limbs requires an individualized consideration and not the strict application of the statute. Her discussion section from the written report provides current guidance for private and public schools in assessing whether a prospective driver meets the functional rather than literal requirements of I.C. 20-9.1-3-1(g).

This complaint arose due to the application of I.C. 20-9.1-3-1(g)(2) to an individual who, during the course of her employment as a school bus driver, underwent surgery for the amputation of her left leg. Less than one month after the amputation, she lost her job due to the provisions of I.C. 20-9.1-3-1(g)(2). This statute provides:

> A person may not drive a school bus for the transportation of school children unless the person:
>
> ...
>
> (g) possesses the following required physical characteristics:
> (1) sufficient physical ability to drive a school bus;
> (2) possession and full normal use of both hands, both arms, both feet, both legs, both eyes and both ears;
> (3) freedom from any communicable disease;
> (4) freedom from any mental, nervous, organic or functional disease which might impair the person's ability to operate a school bus; and
> (5) visual acuity, with or without glasses, of at least 24/40 in each eye and a field of vision with 150 degree minimum and with depth perception of at least 80%.

Indiana Code 20-9.1-3-1 was enacted by the Indiana legislature in 1973 and amended in 1982 to provide for the safe transportation of children to and from school. Unlike many other drivers on the road, the school bus driver is charged not only with safe driving but with many other responsibilities. The driver is responsible for the safety of others. This safety is provided to passengers, mostly young children, who are unable to make decisions or know what will place them in danger. The duties of a school bus driver may include assisting small children and children with disabilities on and off of the bus, assisting or transporting children from one bus onto another bus, assisting or transporting children from the bus into the school or to the classroom, maintaining discipline and assisting, evacuating and caring for children in the event of emergencies. Children often may not have the mental or physical maturation or ability to behave or react appropriately in these circumstances. The school bus driver must have both the mental and physical capabilities to assure the safety of our children.

Fitness standards which impose eligibility criteria that exclude some individuals with disabilities are not prohibited by the ADA where they have a rational relationship to an individual's ability to perform the essential functions of the job (McCarthy v. Nassau County, et al.,617 N.Y.S.2d 860, 6 NDLR ¶ 56 (Sup. Ct., App. Div. 1994)) or where they are necessary to prevent a significant risk to the health or safety others (Wann v. American Airlines, Inc., H-93-2123, 6 NDLR ¶33 (S.D.Tex. 1994). An individual is not "qualified" for a driver's license unless he or she can operate a motor vehicle safely. A public entity may establish requirements, such as vision requirements, that would exclude some individuals with disabilities, if those requirements are essential for the safe operation of a motor vehicle. A public entity does not have to lower or eliminate licensing standards that are essential to the licensed activity to accommodate an individual with a disability. DOJ, Technical Assistance Manual Title II-3.7200.

What the ADA and its regulations do require, however, is an individualized determination as to whether an individual is a "qualified individual with a disability"; that is, whether the individual, with or without reasonable accommodation, can perform the essential functions of the employment position. This would require an individual determination as to whether the individual could safely perform the essential functions of the position. In applying the provisions of I.C. 20-9.1-3-1(g)(2), an employer would also need to make an individualized determination as to whether the individual met the functional requirements set forth by the legislature. In other words, in spite of the disability, does the individual have the functional use of both hands, both arms, both feet, both legs, both eyes and both ears? A blanket application of I.C. 20-9.1-3-1(g)(2), without such individual determinations, could automatically exclude individuals who are qualified individuals with disabilities and do not pose a significant threat to the health or safety of others. Such determinations need to be made by the employer on an individual, case-by-case basis, and not by the rigid application of exclusionary categories.

Title I and Parochial Schools

In Aguilar v. Felton, 473 U.S. 402, 105 S.Ct. 3232 (1985), the U.S. Supreme Court held that public schools district violated the Establishment Clause by providing Title I remedial educational services in parochial school classrooms. This decision, which was rendered shortly before the 1985-1986 school year began, invalidated a common practice of providing the Title I services directly to parochial school students in their parochial school. A significant amount of confusion followed. Eventually some States, including Indiana, began providing Title I services through "mobile classrooms" and other means (including computer-aided instruction). The current method of utilizing mobile classrooms has been challenged as also violative of the Establishment Clause.

In Walker v. San Francisco Unified School Dist., 46 F.3d 1449 (9th Cir. 1995), the 9th Circuit Court found that the use of mobile classrooms parked near parochial schools did not promote religion or cause an impermissible "symbolic union" between church and state, nor did cooperative endeavors between personnel from the parochial school and the public school result in excessive entanglement. The court noted that Title I requires equitable participation by parochial school students with their public school counterparts (see, generally, 34 CFR Part 200,

but particularly Secs. 200.50 and 200.53). Of the 16 parochial schools served by the public school district, the mobile classrooms are parked generally on public property or private property not associated with the parochial school. However, for safety reasons, the school district does park its vans on the property of four parochial schools. The district court found the parking of the mobile classrooms on parochial property violative of the Establishment Clause through the creation of a "symbolic union" between church and state. The U.S. Department of Education and the California Department of Education joined the school district in appealing this decision. The plaintiffs appealed several findings of the district court relative to the consultation, funding and "by-pass" provisions of Title I.

The Circuit Court, in overturning the district court as to the "symbolic union," noted that Title I has a valid secular legislative purpose to improve the educational opportunities of educationally deprived children to attain grade-level proficiency and improve achievement in basic and more advanced skills (at 1455). The court noted that the mere parking of the vans on parochial school property does not provide any direct support to the parochial institution, and is still a publicly funded classroom outside the parochial school environs (at 1457, noting that Aguilar addressed services provided in parochial school classrooms). "[T]he focus of Establishment Clause analysis is not the physical location of a public benefit for parochial school students. Rather, [recent Supreme Court case law] instruct us that the touchstone of Establishment Clause analysis is whether the government is acting neutrally towards religion" (at 1458).

The 9th Circuit's decision echoes a similar decision in the 8th Circuit. See Pulido v. Cavazos, 934 F.2d 912 (8th Cir. 1991), which also found no violation of the Establishment Clause by providing Title I services through mobile units parked on parochial school grounds where the units were separate from the parochial school buildings, the public agency controlled the units, the units contained no religious symbols, only secular subjects were taught, and parochial school personnel could not use the mobile units for any purpose (at 919-20).

There was also a challenge to Chapter 2 funding. This will be discussed in the next Quarterly Report along with Zobrest v. Catalina Foothills School Dist., 113 S.Ct. 2462 (1993), which involved the provision of certain special education services in a parochial school. The 9th Circuit relied in part upon Zobrest in determining Walker.

Drug Testing

As a follow-up to the report in **Quarterly Report** Jan.-March:95, The U.S. Supreme Court announced June 26, 1995, its opinion in Veronia School District 47J v. Acton, 63 LW 4653. The court, by a 6-3 count, overturned the Ninth Circuit's decision which found constitutionally defective the random drug testing through urinalysis of students wishing to participate in school-sponsored activities. The 9th Circuit's decision was in contrast to an earlier 7th Circuit decision which found no such constitutional infringements. See Shaill v. Tippecanoe County Sch. Corp., 864 F.2d 1309 (7th Cir. 1988).

Justice Anton Scalia, writing for the majority, noted that the school district had shown the deleterious effects of drugs on motivation, memory, judgment, reaction, coordination and performance of its students. The effects were manifested in increasingly rude and disrespectful behavior as well as serious sports-related personal injuries. The school tried less intrusive measures to address the drug problems (speakers, materials, presentations, drug-sniffing dog), but the problem did not abate. The school proposed a "Student Athlete Drug Policy" and invited parents to review it and have input at a special meeting. The parents who chose to attend gave the policy unanimous approval. The governing body thereafter approved the policy.

A public school district stands *in loco parentis* for many purposes, Justice Scalia added. A school has custodial and tutelary responsibility for children entrusted to it. Such children have rights appropriate for their status, but these rights are not the same as those of an adult. Finding no Fourth Amendment violation, the court observed: "For their own good and that of their classmates, public school children are routinely required to submit to various physical examinations, and to be vaccinated against various diseases." Id., at 4656. The court specifically mentioned diphtheria, measles, rubella and polio and also noted that "most public schools provide vision and hearing screening and dental and dermatological checks. Others also mandate scoliosis screening at appropriate grade levels." Id. (Internal punctuation has been omitted.) "[S]tudents within a public school environment have a lesser expectation of privacy than members of the population generally." Id., quoting New Jersey v. T.L.O., 469 U.S. 325, 348; 105 S. Ct. 733 (1985).

"Legitimate privacy expectations are even less for student athletes.... Public school locker rooms, the usual sites for these activities [dressing, undressing, showering], are not notable for the privacy they afford," the court wrote, citing with favor to the 7th Circuit's Shaill decision. Student's who chose to participate in athletics voluntarily subject themselves to a higher degree of regulation of behavior than other students generally. "[S]tudents who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy." Id.

The court also found that the manner of collecting urine samples and conducting urinalysis did not involve any great degree of intrusiveness personally and screened only for drugs and not for the presence of other conditions, such as epilepsy, pregnancy or diabetes. The results are disclosed only to a limited, defined class of school personnel and are not turned over to law enforcement officials or used for any internal disciplinary sanctions. Id. The court especially noted with favor the nonpunitive aspect of the school's policy. However, the court expressed concern over the school's requirement that students advise the school in advance of any prescription medications they may be taking which may result in a falsely positive test (at 4657).

Although the school district's policy and program called for drug testing in the absence of individualized suspicion, the school district nonetheless articulated a "compelling state interest" in diminishing the physical, psychological and addictive effects of drugs on school-aged children entrusted to the school, especially when "maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound; children grow chemically dependent more quickly than adults, and their record of recovery is

depressingly poor." Id., at 4657, quoting Hawley, "The Bumpy Road to Drug-Free Schools," 72 Phi Delta Kappan 310, 314 (1990).

While the court found no constitutional infirmity with the District's policy-- the "reasonableness" standard having been met by the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search-- the court left this warning at 4658: "We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts."

Child Abuse: Repressed Memory

The case of Ernstes v. Warner, 860 F.Supp. 1338 (S.D. Ind. 1994) was reported in **Quarterly Report** Jan.-March:95 (repressed memory is not a disability in Indiana which would toll the statute of limitations for bringing a civil case nearly twenty years after alleged molestations by a former junior high school teacher). A court in Minnesota has held otherwide, reversing a lower court's holding that the statute of limitations barred a suit against a former junior high school counselor and school district for alleged sexual abuse occurring twenty-two (22) years earlier. Blackowiak v. Kemp, 528 N.W.2d 247 (Minn. App. 1995). Plaintiff alleged that his suffering from alcoholism, anger, juvenile delinquency, divorce, feelings of resentment, guilt, loss of self-esteem, denial and memory loss were the result of the alleged abuse. He argued that the "spark" which enabled him to realize the causal connection occurred when he met a former classmate who also alleged abuse by the same junior high counselor. The court acknowledged that psychological injuries caused by sexual abuse are different from injuries suffered by victims of other torts, and that sexual abuse victims are more likely to repress memories of the incident. Even though repression may be a reasonable reaction, repressed memories alone will not toll the statute of limitations (at 252). In this case, the court noted that the plaintiff was only eleven years old at the time of the alleged abuse. Although his behavior deteriorated after the incident, he never acknowledged or discussed what occurred nor did he seek or accept counseling. Given his age at the time of the occurrence, he could not have foreseen the extent of injuries he apparently has suffered. The matter was remanded to the lower court, reversing summary judgment for the counselor and the school district.

Court Jesters: Tripping the Light Fandango

A judge will seek amusement where the judge can. This may sometimes be at the expense of narrowly defined interest groups who are very serious about their endeavors but the judge does not share their depth of professional involvement or emotional investment. Such was the case in Arthur Murray Dance Studios of Cleveland v. Witter, 105 N.E.2d 685 (Ohio Com. Pleas 1952), a suit by one dance studio ("Arthur Murray") to enforce a covenant not to compete with a former dance instructor (Witter), preventing him from teaching at a competitor dance studio ("Fred Astaire"). The court showed no mean ability in dancing about the issues:

> When the defendant, Clifford Witter, a dance instructor, waltzed out of the employment of the plaintiff, the Arthur Murray Dance Studios of Cleveland, Inc., into the employment of the Fred Astaire Dancing Studios, the plaintiff waltzed Witter into court. For brevity, the two studios are called "Arthur Murray" and "Fred Astaire". At the time Witter took his contentious step, Arthur Murray had a string attached to him--a certain contract prohibiting Witter, after working for Arthur Murray no more, from working for a competitor. That Arthur Murray and Fred Astaire are rivals in dispensing Terpsichorean[1] erudition is not disputed. Now Arthur Murray wants the court to pull that string and yank Witter out of Fred Astaire's pedagogical pavilion.
>
> No layman could realize the legal complication involved in Witter's uncomplicated act. This is not one of those questions on which the legal researcher cannot find enough to quench his thirst. To the contrary there is so much authority it drowns him. It is a sea--vast and vacillating, overlapping and bewildering. One can fish out of it any kind of strange support for anything, if he lives so long. This deep and unsettled sea pertaining to an employee's covenant not to compete with his employer after termination of employment is really Seven Seas; and now that the court has sailed them, perhaps it should record those seas so that the next weary traveler may be saved the terrifying time it takes just to find them.

The "Seven Seas" of research the court "sailed" were Periodical, the Annotations, the Encyclopedias, the Treatises, the Restatement, the Digest, and the State law. The court noted at 693 that "[i]n sailing the above seven seas more Ships of Justice have gone down for failure to sense the treacherous reefs of generality than for any other reason." The court, beginning at 705, poses a series of sarcastic rhetorical examples to distinguish a dance instructor from elevator operators, law office receptionists, bill collectors, apartment caretakers, college teachers and milkmen ("Take Bill, the bill collector. He may have collected regularly from Mrs. Jones for years. Now he goes to work for a rival agency. Will Mrs. Jones switch to the merchants who use the rival so that Bill can continue coming to her door?")

The court noted at 692 that "the Goddess of Justice...hovers over the American court house with scale in hand" and engages in "a delicate job of weighing" justice with "a three--not a two-pan scale" in order to "balance the conflicting interests of employer, employee and public." Eventually the decision went in favor of the dance instructor, who then, it is presumed, waltzed into the Vienna night with Fred Astaire studios. Apparently it does take only two to tango but at least three to tangle.

---

[1]"Terpsichorean" refers to dancing and is derived from Terpsichore, the Greek Muse of dancing and choral singing.

Quotable...

"A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas." Justice Felix Frankfurter, in a concurring opinion on Tiller v. Atlantic Coast Line Railroad Co., 318 U.S. 54, 68; 63 S. Ct. 444, 452 (1943), lamenting the careless use of the phrase "assumption of risk," which he referred to as "an excellent example to which uncritical use of words bedevils the law."

Date

Kevin C. McDowell, General Counsel
Indiana Department of Education